No. 78-487

In the Supreme Court of the United States

OCTOBER TERM, 1978

MELCHOR MARQUES URIA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 24a-25a) and the decision of the Board of Immigration Appeals (Pet. App. 14a-23a) are not reported.

JURISDICTION

The order of the court of appeals was entered on June 7, 1978. A petition for rehearing was denied on July 24, 1978 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on September 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

QUESTION PRESENTED

Whether the Fifth Amendment privilege against self incrimination permits the drawing of an adverse inference in the context of an immigration hearing on an

application for adjustment of status, where the alien refuses to provide information relevant to the exercise of discretion by the Attorney General.

STATEMENT

1. Petitioner is a native and citizen of Spain who last entered the United States in 1964 as a nonimmigrant sheepherder. He was found deportable in 1971 because of his failure to comply with the conditions of the nonimmigrant status under which he was admitted (A.R. 202-207).[1] The Board of Immigration Appeals dismissed his appeal (A.R. 182-183). Petitioner then filed a motion to reopen his deportation proceedings in order to apply for suspension of deportation pursuant to 8 U.S.C. 1254 (A. R. 178). The motion to reopen was granted (A.R. 174-175), and a new hearing commenced on September 14, 1972. At the hearing, petitioner testified that, on July 15, 1972, he was arrested and given a traffic ticket by Phoenix police officers (A.R. 245). At the time of his arrest, the police found more than $54,000 in the trunk of his car, mostly in $100 bills (A.R. 320-325).[2] The car trunk also contained three bank books in petitioner's name. The bank books indicated that within three days, more than $10,000 was deposited in each account (A.R. 321-322). Petitioner told the officer that he earned $100 a week (A.R. 321).

At the hearing, petitioner was asked to explain his possession of these large sums of money. The immigration judge advised him that although he could avail himself of the Fifth Amendment privilege, "this could cause an adverse inference," and, as a result, there was a

[1]"A.R." refers to the administrative record filed in the court of appeals.

[2]The police officer apparently intended to book petitioner for driving while intoxicated. Petitioner asked the officer to get his money out of the car (A.R. 320).

"possibility" that his application for suspension of deportation would be denied (A.R. 251, 261-262).[3] On advice of counsel, petitioner declined to answer questions about the source of the $54,000 and about his bank accounts.[4] Thereafter, the immigration judge denied petitioner's application for suspension of deportation as a matter of discretion (A.R. 162-172).

The Board of Immigration Appeals affirmed the immigration judge's decision on a different ground—that petitioner had failed to establish his statutory eligibility for the relief sought (A.R. 125-128).[5] Petitioner did not appeal from the Board's decision of March 11, 1975 and does not challenge its correctness here.

2. On July 23, 1975, petitioner submitted a new motion to reopen his deportation proceeding, in order to apply for adjustment of his immigration status to that of a lawful permanent resident alien, pursuant to 8 U.S.C. 1255 (A.R. 91-92). The Board granted his motion to reopen (A.R. 87-88), and the reopened hearing took place on December 3, 1976. At that hearing, it was conceded that petitioner was statutorily eligible for adjustment of

[3]Petitioner was also advised that any statement he made could be used against him "by any other branch of the United States Government" (A.R. 261).

[4]Counsel stated (A.R. 268, 326) that he had advised petitioner to refuse to answer because there was an ongoing investigation of petitioner by the Internal Revenue Service, and that he would advise petitioner to answer the questions when the IRS investigation was concluded.

[5]An applicant for suspension of deportation must establish, *inter alia*, that deportation would result in "extreme hardship" to himself or certain enumerated immediate relatives who are United States citizens or lawful permanent residents.

Petitioner claimed that he would suffer "extreme hardship" because he could not receive his workmen's compensation award of eleven dollars a month if he left Arizona. The Board held that the facts of record "suggest that he is a man of substantial means. Hence, he has failed to establish the hardship alleged" (A.R. 128).

status.[6] The sole question was whether he merited that "extraordinary" relief as a matter of administrative discretion (A.R. 43, 65).[7]

Petitioner was asked the following question: "[W]ere you ever called in by the Internal Revenue Service to account for the huge amount of cash you had on your person at the time of your traffic arrest back in 1972?" (A.R. 62). After counsel's objection on the ground of relevancy had been overruled, she stated that she would instruct petitioner to invoke the Fifth Amendment privilege "[a]s to any question dealing with money" (A.R. 63). The immigration judge then reminded counsel that in 1972, at the hearing on petitioner's application for suspension of deportation, counsel for petitioner had stated that petitioner would answer questions regarding financial matters after the IRS had completed its investigation (A.R. 64). Counsel responded (*ibid.*) that although there had "been an investigation * * * and no charges were filed, * * * that kind of investigation, essentially, is never complete." The immigration judge, while recognizing petitioner's right to invoke the Fifth Amendment privilege, stated that "this would have considerable bearing on whether or not he deserves [adjustment of status relief] in the exercise of * * * discretion" (A.R. 65-66).

Petitioner's brother, Pedro Marques, also testified at the hearing. He stated that he employed petitioner as a bartender at the Copper State Buffet, in Phoenix, and that petitioner earned approximately $60 a week (A.R. 76-77, 105). When asked whether his brother had ever given or lent him large amounts of money, Marques

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[6]Petitioner's brother, a naturalized American citizen, had submitted a visa petition in his behalf which was approved by INS.

[7]See, *e.g.*, *Ameeriar* v. *INS*, 438 F. 2d 1028 (3d Cir. 1971); *Chen* v. *Foley*, 385 F. 2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968).

claimed that he could not remember (A.R. 79-80, 82-83), or alternately, that he did not wish to answer the question (A.R. 79). He did not invoke the Fifth Amendment privilege. At the hearing it was also brought out that petitioner had been arrested for shoplifting and for allowing a "go go" dancer to perform an "indecent exhibition" at the Copper State Buffet (A.R. 44, 327-328). Neither incident resulted in a conviction.

The immigration judge denied petitioner's application the exercise of discretion (A.R. 39-46; Pet. App. 1a-13a). The judge listed several unfavorable factors which, in his opinion, militated against granting petitioner the relief sought. Among these were the two arrests already mentioned, petitioner's failure to file required address reports with INS, the evasive testimony of petitioner's brother, petitioner's lack of family ties in the United States (other than his brother), and the fact that petitioner had unduly prolonged his stay in this country by various motions and appeals (A.R. 43-44). The decision also stated (A.R. 45):

> I find a rather unfavorable factor the fact that [petitioner] has cut off a legitimate line of inquiry in these proceedings. Although it is not required that he show good moral character for any length of time in order to receive the benefit of adjustment of status, I find that I have been prevented from making a full inquiry into whether he deserves such relief in the exercise of my administrative discretion by his refusal to testify as to how he happened to have $54,000 in his possession and bank books totalling $32,000 at a time when he had a minimal income.

Petitioner appealed, arguing that the immigration judge's decision was an abuse of discretion in that it had impermissibly penalized petitioner's reliance on his Fifth Amendment privilege. The Board of Immigration Appeals affirmed the immigration judge's decision (A.R. 4-7; Pet.

App. 14a-23a), and the court of appeals affirmed the Board's decision (Pet. App. 24a-25a). The Board held that petitioner "had every right to assert his claim under the Fifth Amendment. However, in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application for discretionary relief" (Pet. App. 21a-22a). The Board and the court of appeals both relied on *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960).

ARGUMENT

Petitioner contends (Pet. 12-17) that the decision below is in conflict with a number of this Court's decisions interpreting the Fifth Amendment privilege.[8] He argues that the *Garrity-Lefkowitz* line of cases undercuts the authority of *Kimm* v. *Rosenberg, supra*.[9] But, we submit, petitioner's argument is foreclosed by this Court's decision in *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

Palmigiano was a state prison inmate charged with inciting a prison disturbance. He was summoned before the prison Disciplinary Board and informed that he might be prosecuted for a violation of state law. He was also told that although he had a right to remain silent during the disciplinary hearing his silence would be held against him (*id.* at 312). He was informed that anything he said in the disciplinary hearing could be used against him in a criminal proceeding (*id.* at 333, Mr. Justice Brennan concurring in part and dissenting in part). Palmigiano remained silent during the hearing in the face of evidence

[8] *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Sanitation Men* v. *Sanitation Comm'r*, 392 U.S. 280 (1968); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973); *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

[9] In *Kimm* the alien applied for suspension of deportation. This Court upheld the determination that the alien had not met his statutory burden of showing eligibility for the relief requested where, invoking the privilege, he refused to respond to the question whether he was a communist.

that incriminated him. The Disciplinary Board's decision was that he be placed in "punitive segregation" for 30 days and that his classification be downgraded thereafter (*id.* at 312-313). The "disciplinary penalty was imposed to some extent, if not solely, as a sanction for exercising the constitutional privilege" (*id.* at 332, Mr. Justice Brennan concurring in part and dissenting in part).

This Court distinguished the line of cases from *Garrity* to *Lefkowitz* on the ground that those decisions all involved situations where "the States, pursuant to statute, sought to interrogate individuals about their job performance or about their contractual relations with the State; insisted upon waiver of the Fifth Amendment privilege not to respond or to object to later use of the incriminating statements in criminal prosecutions; and, upon refusal to waive, automatically terminated employment or eligibility to contract with the State" (425 U.S. at 316-317).

The Court observed (*id.* at 317) that in *Palmigiano* "[n]o criminal proceedings are or were pending against Palmigiano." The state had not, contrary to *Griffin* v. *California*, 380 U.S. 609 (1965), sought to make evidentiary use of Palmigiano's silence at the disciplinary hearing in any criminal proceeding. Nor had the state insisted or asked that Palmigiano waive his Fifth Amendment privilege. He was notified that he was privileged to remain silent if he chose. Although he was advised that his silence could be used against him, he was not as a consequence of his silence automatically found guilty of the infraction with which he had been charged. As the Court continued (*id.* at 318-319):

> In this respect, this case is very different from the circumstances before the Court in the *Garrity-Lefkowitz* decisions, where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the

other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege. The advice given inmates by the decisionmakers is merely a realistic reflection of the evidentiary significance of the choice to remain silent.

* * * * *

Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a *party to a civil cause.*" 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961). In criminal cases, where the stakes are higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context.[10]

[10]The Court went on to quote Justice Brandeis' opinion for a unanimous Court in *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 153-154 (1923), a deportation case: " 'Silence is often evidence of the most persuasive character' " (*id.* at 319).

In the instant case, the government did no more than was deemed permissible in *Palmigiano*. It did not compel petitioner to waive his Fifth Amendment privilege. It did not make evidentiary use of petitioner's silence at the immigration hearing in any criminal proceeding. Petitioner's application for adjustment of status was not automatically denied as a consequence of his silence; on the contrary, "his silence was given no more evidentiary value than was warranted by the facts surrounding his case." 425 U.S. at 318.[11] See *Lefkowitz* v. *Cunningham*, 431 U.S. at 801, 808 n.5 (1977).

Indeed, petitioner's legal position is even weaker than that of Palmigiano. The latter was penalized as a result of his silence while petitioner was merely denied a *discretionary* immigration benefit as to which he had the burden of proof. See 8 C.F.R. 242.17(d); *Santos* v. *INS*, 375 F. 2d 262 (9th Cir. 1967); *Tibke* v. *INS*, 335 F. 2d 42 (2d Cir. 1964). We submit that "not every undesirable consequence which may follow from the exercise of the privilege * * * can be characterized as a penalty," *Flint* v. *Mullen*, 499 F. 2d 100, 104 (1st Cir. 1974), and that the discretionary denial of favorable status to an applicant who has prevented full assessment of his qualifications does not violate the Fifth Amendment. See *McGautha* v. *California*, 402 U.S. 183 (1971); *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77 (1957); *Orloff* v. *Willoughby*, 345 U.S. 83, 91 (1953). See also *Cabral-Avila* v. *INS*, No. 77-1626 (9th Cir. May 30, 1978) (although aliens may invoke the Fifth Amendment privilege in deportation proceedings, they do not thereby shield themselves from

[11]Both the immigration judge and the Board of Immigration Appeals based their decisions on the fact that petitioner's silence "cut off a legitimate line of inquiry" (Pet. App. 12a) and "prevented [the immigration judge] from reaching a conclusion about [petitioner's] entitlement to the discretionary relief he seeks" (*id.* at 21a).

deportation if they have the burden of proof with respect to any determinative issue).[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12]Contrary to petitioner's assertions (Pet. 17-19), there is no conflict between the decision below and decisions of the Seventh Circuit. *Valeros* v. *INS*, 387 F. 2d 921 (7th Cir. 1967), merely held that testimony compelled in violation of the Fifth Amendment may not be used in a deportation hearing. In *Rassano* v. *INS*, 377 F. 2d 971 (7th Cir. 1967), the court of appeals remanded a case for further consideration in light of *Spevack* and *Garrity*, where the immigration judge denied suspension of deportation at least in part because of the alien's invocation of the Fifth Amendment privilege before a grand jury. We do not know the precise facts in *Rassano;* in any event, the per curiam remand order in that case preceded this Court's decision in *Palmigiano*.

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